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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX JAMES BRUNO III,

Defendant and Appellant.

C080716

(Super. Ct. No. 12F06363)

A jury found defendant Alex James Bruno III guilty of two counts of attempted murder. (Pen. Code, §§ 664/187, subd. (a).)¹ The jury also found true the allegations that he inflicted great bodily injury (§ 12022.7, subd. (a)) and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court

¹ Further undesignated statutory references are to the Penal Code.

sentenced defendant to 50 years to life in prison plus an 11 year four month determinate term.

On appeal, defendant contends that some of the prosecutor's remarks during closing argument constituted prejudicial misconduct in violation of his due process rights under the Fourteenth Amendment. Recognizing that defense counsel's failure to object to the prosecutor's remarks at trial forfeited any claim of prosecutorial misconduct on appeal, defendant argues that the failure to object constituted ineffective assistance of counsel. Disagreeing, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In light of the limited issues raised on appeal, a detailed recitation of the underlying facts and procedural history of this case is unnecessary. It suffices to say that defendant was identified as the individual who fired multiple gunshots from a car into a group of people outside a residence on September 21, 2012. Two people were seriously injured. There was evidence that defendant appeared to be "on something" on the night of the shooting, and that the gunshots were fired from a car that defendant's grandmother had rented a few weeks before the shooting. There was also evidence that defendant was with his grandmother when she rented the car, made rental payments for the car in September 2012, and took the car to a repair shop the day after the shooting to fix a hole in the door and replace the right rear window.

Prior to closing argument, the jury was read the pattern instructions for reasonable doubt and voluntary intoxication, among others. Defense counsel argued voluntary intoxication precluded a finding of intent. During his closing argument, the prosecutor stated, "Reasonable doubt. You have it in the instructions. I won't spend too much time on it. It doesn't have to eliminate all possible doubt. You can sit here, consider all possibilities how else [the shooting] occurred, but that's not your job. It is not the oath you took. [¶] You took an oath to consider the evidence that was presented in this case, and your job is not to go back there and find other reasons why the defendant isn't guilty.

You can do it based on the evidence you have received, and that is the sworn testimony of all the witnesses and those items that were admitted to you.”

In rebuttal, the prosecutor discussed the issue of intent to kill. He stated, “You can’t just get drunk and claim you are not responsible for your actions. [¶] In fact, it is usually the other way around. It is usually the alcohol that emboldens you to do something you may not do before you had the alcohol. All right? And that may be a factor for what we have here. Maybe a little of that, his anger, and there it goes and that’s why. [¶] But again, that’s a little bit speculative, and I am not going to -- you don’t have to determine that. What you are going to determine is did he shoot, did he intend to kill. And all the evidence from this witness stand and that table, beyond a reasonable doubt shows you that he did.”

Following closing arguments, the jury found defendant guilty of two counts of attempted murder and accompanying allegations as outlined *ante*, and the trial court sentenced him accordingly. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that the prosecutor’s remarks during closing argument misstated the law on reasonable doubt. According to defendant, the prosecutor’s remarks improperly lowered the People’s burden of proof by conveying to the jury that they were not required to consider defendant’s theories of defense, including voluntary intoxication. Defendant asserts the remarks created a reasonable likelihood that the jury applied a standard less than proof beyond a reasonable doubt.

First and foremost, defendant acknowledges that trial counsel did not preserve his claim for appeal by objecting to the challenged portions of the argument, but claims that we should exercise our discretion to consider the issue because it implicates his fundamental constitutional rights.

“ ‘To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to

disregard the improper argument.’ ” (*People v. Linton* (2013) 56 Cal.4th 1146, 1205.) A court will excuse a defendant’s failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*); *People v. Hill* (1998) 17 Cal.4th 800, 820.) We conclude that defendant’s claim is forfeited. Our review of the record does not reveal that an objection would have been futile, although it would not necessarily have been successful. Further, even assuming the challenged remarks were improper, the remarks were not so egregious that a prompt objection and admonition would not have cured the harm. (*Centeno*, at p. 674 [“A prosecutor’s misstatements of law are generally curable by an admonition from the court”].)

We also reject defendant’s alternative argument that defense counsel’s failure to object constituted ineffective assistance of counsel.

“ ‘A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel.’ [Citation.]” (*Centeno, supra*, 60 Cal.4th at p. 674.) “ ‘To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant.’ [Citation.]” (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.)

“ ‘Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” ’ [Citations.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ‘ “ ‘no conceivable tactical purpose’ ” for counsel’s act or omission. [Citations.]’ [Citation.] ‘[T]he decision facing

counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one’ [citations], and ‘a mere failure to object to evidence or argument seldom establishes counsel’s incompetence’ [Citation.]” (*Centeno*, *supra*, 60 Cal.4th at pp. 674-675.)

We conclude that defendant has failed to establish ineffective assistance of counsel. Even assuming the remarks were improper and objectionable, defendant has not shown that there was no conceivable tactical purpose for trial counsel’s failure to object. Moreover, defendant has not shown prejudice. Here, the jurors were instructed to follow the court’s instructions on the law if the comments by the attorneys conflicted with those instructions, the trial court gave the pattern instructions for reasonable doubt and voluntary intoxication orally and in writing, defense counsel quoted part of the trial court’s instructions on reasonable doubt and voluntary intoxication during closing argument and told the jurors the reasonable doubt instruction was in the packets provided by the court, and the prosecutor referenced the court’s reasonable doubt instruction prior to making the challenged remarks. The remarks were brief and only a small part of the prosecutor’s lengthy closing argument. Under these circumstances, it is not reasonably probable that, but for counsel’s failure to object, the result would have been more favorable to defendant. (See *People v. Cortez* (2016) 63 Cal.4th 101, 131-134 [finding no reasonable likelihood the jury construed or applied the prosecution’s challenged remarks in an objectionable fashion under similar circumstances].)

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.